

NOTA MONOGRAFICA

LABOR ARBITRATION: A PRIVATE PROCESS WITH A PUBLIC FUNCTION

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It is traditional learning, indeed a commonplace legal premise, that arbitration is a private process created by private agreement. The arbitrator is a child of the contract, his powers are defined by the contract, and his award draws validity from the contract. But one cannot read the Supreme Court decisions of the last five years without a compelling awareness that this is an incomplete description of labor arbitration. For though arbitration is a private process, it performs a public function; though it is a creature of contract, it is an instrument of national labor policy.

In *Warrior & Gulf*¹ the Supreme Court embraced arbitration of grievances as "a major factor in achieving industrial peace," and declared that "complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes."² Because it serves this national policy "the arbitration of labor disputes has quite a different function from arbitration under ordinary commercial agreements."³ The dual character of labor arbitration as a private process fulfilling a public function lay at the center of the Court's decision:

For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Yet to be consistent with congressional policy in favor of settlement of disputes through the machinery of arbitration, the judicial inquiry must be strictly confined to whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award

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¹ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

² 363 U.S. at 588, fn. 4.

³ 363 U.S. at 578.

he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.⁴

Any illusions that labor arbitration is simply a creature of contract was dispelled by the Court's opinion in *John Wiley & Sons v. Livingston*.⁵ Although the collective agreement contained no provision making it binding on successors, the Court held that the duty to arbitrate was binding on the successor corporation with whom the employer merged. The generative force was not consent but "the central role of arbitration in effectuating national labor policy." It would "derogate from the federal policy . . . if a change in corporate structure . . . had the automatic consequence of removing a duty to arbitrate previously established."⁶ Then the revealing sentence:

Although the duty to arbitrate, as we have said, must be founded on contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.⁷

It is futile now to reecho the plaintive cry of Mr. Justice Whitaker that "This is an entirely new and strange doctrine to me,"⁸ for labor arbitration has been firmly impregnated with the public function. Nor is this without reason. Labor arbitration is an integral part of the collective bargaining process—a process which, though it results in a system of private agreements, is neither wholly consensual nor purely private. The union's status is determined by statute, and the employer has no freedom to choose with whom he will contract. He is compelled to negotiate, and if agreement is reached, to sign a written contract which is legally enforceable as a matter of national policy. In short, the collective bargaining structure is framed by federal law which limits freedom of contract

⁴ 363 U.S. at 582-3.

⁵ 376 U.S. at 543 (1964).

⁶ 376 U.S. at 549.

⁷ 376 U.S. at 550.

⁸ Dissenting opinion in *United Steelworkers of America v. Warrior & Gulf Refining Co.*, 363 U.S. at 589.

for the purpose of securing other valued objectives. Labor arbitration, as a part of that structure, has been co-opted and shaped by the Court to help achieve those objectives.

The conclusion that labor arbitration is not merely a private process but that it also performs a public function is only the beginning of our inquiry. This function is emphasized here only because the beguiling halftruth that arbitration is based on contract may cause us to forget that within the collective bargaining structure grievance arbitration serves a public purpose. Difficult problems cluster around the central question of how much arbitration is to be shaped to fulfill public purposes and for what particular purposes, because arbitration must root in the consent of the parties and must serve their private purposes. Thus, the dual character of labor arbitration creates a potential tension between its public and private functions. The intention of this paper is to explore this area of tension in the hopes of gaining a bit better understanding of how this tension is to be resolved.

I

The gateway to understanding this problem is a clear recognition of the essential function of grievance arbitration. When a dispute arises during the term of a collective and the parties are unable to resolve it by negotiation, it can be resolved through one of three processes—through a contest of economic force, through litigation, or through arbitration. These are the only processes available; these are the only forums to which the parties can carry their dispute.⁹ Arbitration is thus an alternative procedure to trial by the court on the one hand and trial by combat on the other. It is because arbitration is the alternative to the other two processes that it is impressed with a public function.

Arbitration as an alternative to litigation is presented in *Steel-*

⁹ On first glance, it might seem that there is a fourth forum—the employer. The verbal formula would be that if the matter is within the discretion of management, then the employer is the proper forum. However, the grievance inescapably asserts that the decision made by the employer is not within the scope of his discretion and the employer's answer to the grievance asserts that it is within his discretion. The very dispute is whether the employer's action is within his discretion, and it is this dispute which must be decided by the court, the arbitrator or economic force.

*workers v. Warrior & Gulf Navigation Co.*¹⁰ The union filed a grievance claiming that the employer's contracting out maintenance work violated the collective agreement. When negotiations failed, the union demanded arbitration, but the employer refused, claiming that contracting out was "strictly a function of management." In arguing that the grievance was not arbitrable, the employer was not suggesting that the dispute should be resolved by economic force, for that avenue was blocked by the no-strike clause. What the employer plainly sought was a determination by the court that contracting out did not violate the collective agreement. In arguing that the dispute was not arbitrable, the employer necessarily asserted that it should be decided by the court. Implicit was the additional contention that it should be decided in his favor.¹¹ The threshold issue before the court was simply which was the proper forum for deciding whether contracting out violated the agreement—the court or the arbitrator.

The choice between judicial and arbitral determination is, in the first instance, for the parties. When they have clearly agreed, their choice will be given full deference, but there are concerns beyond the parties which are to be given weight when their choice is equivocal. The Court in the *Steelworkers* case makes two of these articulate. First, the issues raised by grievances and the considerations to be brought to bear are beyond the normal competence of the courts and are peculiarly suited for the arbitration process. The courts have an interest in protecting themselves from being burdened by cases for which they have limited competence when a more competent tribunal is available. Second, arbitration is viewed by the Court as making an affirmative contribution to collective bargaining as a system of industrial self-government. The arbitrator gives meaning and content to the collective agreement, molding a system of private law to meet the needs of the parties and to maintain order in their relationship. Arbitration thus promotes in a way what the courts cannot: the goals which Congress sought to achieve in framing the structure of collective bargaining. Therefore, when the parties have not clearly expressed their preference for the judicial forum,

¹⁰ *Supra* note 1.

¹¹ The grievance asserted that the agreement limited the employer's freedom to contract out and that the employer had exceeded the limits imposed by the agreement. The argument that the matter was "not arbitrable" was a direct denial of the union's grievance by an assertion that the agreement placed no limits on the employer's freedom to subcontract.

these considerations weigh in favor of arbitration. In the words of the Court, "doubts should be resolved in favor of coverage."

Arbitration as an alternative to the strike was presented in *Local 174 v. Lucas Flour Co.*¹² The employer had discharged an employee for unsatisfactory work. The collective agreement provided that such disputes "shall be submitted to arbitration" and that "the decision shall be final and binding," but did not include a no-strike clause. The union did not seek arbitration but struck to compel reinstatement, and the employer then sued the union for damages caused by the strike. The Court held that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement."¹³ When the parties chose arbitration as the exclusive remedy, they necessarily rejected economic force as an alternative remedy.

Again the choice between arbitration and economic force is for the parties. Indeed, the parties might agree that the union should have its choice of forum; that it could elect to arbitrate or to strike. But again there are considerations which weigh in favor of arbitration and against economic force when the parties' choice is equivocal. The Court has found a strong congressional policy preferring the peaceful adjustment of grievances by methods agreed upon by the parties. Arbitration is favored because it serves this congressional purpose, and resort to economic force is disfavored because it frustrates this purpose. Thus when the union in *Lucas Flour* argued that the provision for arbitration did not preclude trial by battle, the Court pointed out that this "would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." When the parties have made arbitration available, access to the alternative process of economic conflict is closed unless the parties have explicitly held both avenues open.

From all that has been said it is clear that the parties remain free to choose the forum for resolving their disputes. They can agree to carry their unsettled grievances to the court, to the arbitrator, or to the economic arena, and the law will give binding effect to their choice. This is not out of indifference but out of deference

¹² 369 U.S. 95 (1962).

¹³ 369 U.S. at 105.

to the freedom of the parties to order their relationship through collective agreement, for values other than freedom of contract make arbitration the preferred forum. As a substitute for the courts, arbitration frees judges from the responsibility of adjudicating matters for which they lack full competence and provides a tribunal peculiarly suited to meet the needs of industrial self-government. As the substitute for the strike, arbitration helps achieve industrial peace and replaces the rule of force with the rule of law. Arbitration is promoted and relied upon to serve these public purposes. Unless the parties have made clear their choice to the contrary, the courts will prefer that forum which for these public purposes it finds most appropriate.

To be sure, this impinges on freedom of contract, for it affects the substance of the bargain. The employer can draft language which clearly excludes sub-contracting from arbitration but its very clarity will increase resistance to its acceptance. The employer will be able to circumscribe arbitration only at the cost of concessions on other terms or a strike. Similarly, the union can find adequate words to negative the no-strike obligation, but getting them written into the contract may prove impossible. In the dynamics of bargaining the burden is always on the one seeking changes, and particularly changes which require the adding of unambiguous words to the agreement. However, arbitration remains rooted in the consent of the parties. Their freedom of contract is burdened only in the small measure that the public interest in having disputes settled in the most appropriate forum is given weight in the balance of the bargain made by the parties.

II

Let us now turn to examine the import of the public function of arbitration in more troublesome problem areas. A sensitive problem, and one which has been given new life and meaning by the evolving law of Section 301, is the right of the individual employee in arbitration. This involves at least two separable problems—first, the right of an individual to carry his grievance to arbitration when the union refuses, and second, the right of an individual

to participate when the union carries a case to arbitration which directly affects his interests.¹⁴

The Supreme Court's decision in *Humphrey v. Moore*¹⁵ provides the point of departure. In this case, two auto transport companies were hauling Ford cars from the Louisville assembly plant. When business declined so that there was not enough for both they agreed that one, Dealers, would take over the work of the second, E & L. The employees of both companies were represented by the Teamsters and were covered by the same multiple employer contract. When the E & L employees began to be laid off they filed grievances claiming that the seniority lists should be "sandwiched" and they should be taken on at Dealers, the surviving company, with their seniority acquired at E. & L. This grievance was ultimately decided by the national joint union-employer committee in favor of the E & L employees. This had the effect of causing the layoff of a large number of Dealers employees. They sued to enjoin the union and the employer from giving effect to this decision on two grounds: 1) that it was made in violation of the collective agreement; and 2) that the local union had violated its duty of fair representation by taking a position hostile to them and denying them a fair hearing before the joint committee. The Court held that the individuals could sue under Section 301 for breach of the collective agreement and for unfair representation, but found that the decision of the joint committee did not violate the collective agreement and that union had not violated its duty of fair representation.

The Court does not attempt to map out the rights of the individual under the collective agreement but two basic guidelines are made reasonably clear. First, the collective agreement is more than a two party contract between the union and the employer; it creates legally enforceable rights in individual employees.¹⁶ Second, the individual can bring suit under Section 301 even though the union and the employer have agreed upon an interpretation of the agreement

¹⁴ There is no intention here to explore the many facets of this problem. For more complete analysis see Summers, *Individual Rights in Collective Agreements And Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at The Problem*, 24 Md. L. Rev. 233 (1964); Blumrosen, *The Worker and Three Phases of Unionism, Administrative And Judicial Control of The Worker-Union Relationship*, 61 Mich. L. Rev. 1435 (1963).

¹⁵ 375 U.S. 335 (1964)

¹⁶ This was already firmly established by *Smith v. Evening News*, 371 U.S. 195 (1962).

and settled a grievance adversely to his interest. The rights of the individual in arbitration were not immediately involved¹⁷ but these guidelines and other elements of the opinion have important radiations.

The clearest radiations of the case run toward the second and simplest of our two problems—the right of the individual to participate in arbitration proceedings which directly affect his interests. The Court made articulate the obvious—that the union does not violate its duty of fair representation by “taking a good faith position contrary to that of some individuals whom it represents in supporting the position of one group of employees against that of another.”¹⁸ But the Court also makes plain that the disfavored employees are entitled to a fair hearing which includes the right to attend, to present evidence and to state their position. The Court was, of course, speaking of proceedings before the joint-committee, the final step in the grievance procedure, but the individual rights are certainly not less in arbitration. This conclusion would, indeed, seem self-evident from the essential function of arbitration. For arbitration serves as a substitute for the judicial process, and when conflicting claims of seniority are involved, as in *Humphrey v. Moore* the adjudication is binding not only on those pressing the grievance but also on those whom they seek to displace. The individuals have legal rights to the seniority provided by the collective agreement and it is these rights which the arbitrator is adjudicating as a substitute for the court. The public function of arbitration requires that it observe the rudiments of due process. This in no wise weakens the consensual roots of arbitration, for the union and management by carrying the case to arbitration have agreed upon that forum. But they cannot, by choosing that forum deprive those whose rights are being determined the opportunity to be heard.

The other problem—the right of the individual to carry his case to arbitration when the union refuses—is more difficult and on this the Court gives less light. We proceed from the premise that

¹⁷ The Joint Conference Committee which made the challenged decision was not an arbitration tribunal but the last step in the grievance procedure. Although it held hearings and had some appearances of an arbitration tribunal, it was made up of an equal number of representatives of the national employers association and the international union. The contract provided that if the Joint Conference Committee was unable to reach an agreement the matter was to be submitted to arbitration.

¹⁸ 375 U.S. at 349.

the individual's rights under the collective agreement survive a purported settlement by the union and the employer which is contrary to the terms of the agreement. Had Mr. Justice Goldberg's dissenting view¹⁹ prevailed, the individuals' rights would be extinguished by the parties settlement and that would be the end of the problem. But the majority assumes that the individual can seek a determination whether the settlement is consistent with the terms of the agreement. Indeed, the Court explicitly made that determination. At this point it must be emphasized that the Court did not make an independent interpretation of the agreement to find the one true meaning to ambiguous words. It reviewed the parties interpretation to see if "the section reasonably meant what the Joint Committee said or assumed it meant"²⁰ and found that, "It was permissible to conclude"²¹ that the section authorized the settlement.

The question with which we are concerned is, which is the proper forum for determining the individual's rights under the collective agreement, assuming that the parties have provided arbitration for union grievances of the same class. The public function of arbitration points unmistakably toward it as the most appropriate forum. The need for the courts to avoid adjudicating rights governed by the common law of the shop and to allocate such disputes to more competent tribunals is the same as in other grievances. In addition, the considerable value in developing a coherent body of industrial law to govern the parties also commends that equivalent issues not be decided in different forum. And finally, the individual's right to equal treatment requires that his rights be determined by the same tribunal as those of his fellow workers.

The private nature of arbitration points in both directions. If the employer has agreed to arbitrate with the union, to compel him to arbitrate with the individual is to go beyond the bounds of his expressed consent. But one might ask whether this narrow view of who are parties to the arbitration agreement is not even more dryly conceptual than the employer's contention in *Wiley v. Livingston*.²² The heart of the employer's objection is that to allow the individual to demand arbitration adds to the burden of the obliga-

19. Mr. Justice Goldberg concurred in result, but he vigorously dissented from the majority's analysis of the rights of the individual under the collective agreement. See 375 U.S. at 352-5.

20 375 U.S. at 345.

21 375 U.S. at 346.

22 *Supra* note 5.

tion, for in agreeing to arbitration the employer counted on the union's reasonableness and willingness to settle. But this added burden may be more verbal than real, for the union's settlement cannot bar the individual from seeking an adjudication of his rights either in the courts or before an arbitrator. The added burden, if it is any, is that of arbitration instead of litigation. On the other hand, arbitration of the individual's claim fulfills the more fundamental purposes of the parties' agreement to arbitrate. The parties have agreed that arbitration is the more appropriate forum for adjudicating the class of issues at hand; they have bargained for the special considerations and judgment which an arbitrator will bring to bear; and if arbitration is more expensive because they must pay the arbitrator, they have judged that his competence is worth the cost. To decide the individual grievance in court would defeat their deeper expectations.

These considerations weigh heavily in favor of arbitration as the proper forum for adjudicating individual rights when the agreement has provided arbitration for the kind of issue involved, at least when the contract does not explicitly provide otherwise. Whether an explicit provision barring the individual from the forum generally available for determining disputes would run athwart other statutory policies or prohibitions, we cannot explore here.²³

When the individual carries his case to arbitration, the union is clearly a necessary party. It has a separable interest in the outcome of the case, and the decision will become a part of the body of law which influences future cases. Moreover, the tribunal cannot fulfill its function unless it knows the considerations which led the union to conclude that the claim lacked merit. The practical consequence of having the union as a party will be to give added weight to interpretations agreed upon by union and management to the extent that they are reasonable within the context of the words of the agreement and the established practices of the parties. The result will be equivalent to that suggested by the Court in *Humphrey v. Moore*—whether the contract “reasonably meant” what the parties assumed it meant.

²³ See note 14 *supra*.

III

Far more difficult problems of arbitration as a private process performing a public function are projected by the two headed case of *Carey v. Westinghouse*.²⁴ The NLRB had certified the IUE as bargaining agent for "all salaried technical employees," except production and maintenance employees. Each union had made a collective agreement containing a recognition clause stating that the company recognized the union as exclusive representative for the units certified by the NLRB and listing the units. Thus, the IUE agreement listed "all production and maintenance employees" in the plant "but excluding all salaried and technical employees." The IUE filed a grievance claiming that certain salaried employees in the engineering laboratory were in fact doing production and maintenance work and that this violated the union recognition clause. The company refused to arbitrate on the grounds that this was a dispute over representation and was for the NLRB. The Supreme Court did not attempt to determine whether this was a dispute as to whether the work should be assigned to employees in the IUE bargaining unit rather than to employees in the Federation unit, or whether it was a dispute as to which union should represent the employees doing the work. Instead, the Court examined the problem from both hypotheses.

Treating it as a work assignment dispute, the Court pointed out that although Section 10 (k) provides a procedure for resolving such disputes, this section can be invoked only if there is a strike or threat of strike. Unwilling to find a *hiatus* allowing no recourse to arbitration of work assignments without forcing the dispute to the strike stage, the Court held that grievance arbitration was available. The Court acknowledged that only one of the unions had sought arbitration so an adjudication might not put an end to the dispute, but it added hopefully, "the arbitration may as a practical matter end the controversy or put into motion forces that will resolve it."²⁵

Treating the dispute as one involving representation rights, the Court recognized that Board procedures were available, for either the union or the employer could move to have the certification

²⁴ 375 U.S. 261.

²⁵ 375 U.S. at 265.

clarified and thereby resolve the dispute. This, however, did not preclude arbitration, for remedies before the Board did not preempt remedies for breach of the collective agreement. The Court again acknowledged that the arbitrator's decision would be inconclusive, not only because the other union was not a party to the proceedings, but because final authority on representation matters was for the NLRB and different decision by it would take precedence. But the Court redoubled its hope that "resort to arbitration may have a pervasive, curative effect even though one union is not a party."²⁶

Before analyzing this curious mixture of judicial frustration and faith, we would suggest that the Court's result may have been better than its reasoning. There is reason to suspect that this was in fact neither a work assignment dispute between two unions nor a genuine representational dispute. The opinions bear no trace of any claim by the Federation that this work belonged to the salaried and technical employees. And if the employer genuinely believed that this was a representation issue, why did it not reinforce its claim of non-arbitrability by petitioning the Board and settling the issue rather than fighting a three year battle in the courts? The Court may have sensed that in reality nothing more was involved than a claim that the employer had improperly transferred work out of the bargaining unit, a garden variety case for arbitration.²⁷ The dispute was with the employer, not the other union and arbitration would in fact settle the matter.

If there is a full-fledged work assignment dispute between two unions, ordering arbitration between the employer and one union serves little public or private purpose. To be sure, national policy favors the arbitration process for deciding such disputes—this is implicit in Section 10 (k). And it is presumed that such problems are within the special competence of arbitrators. But the arbitration process which Section 10 (k) endorses is one in which both unions are parties; and there can be no confidence in the competence of an arbitrator who does not hear the opposing claims. There is also a strong national policy that these disputes between unions be resolved by adjudication, either before arbitrators or the Board, rather than by economic warfare. However, arbitration with one union will scarcely pacify the other, but will rather lead the other

²⁶ 375 U.S. at 272.

²⁷ Indeed, the case so viewed is strikingly parallel to *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* note 1.

union to distrust such orderly processes. Such "therapy of arbitration" may be the masaging of broken bones. The courts have an additional interest of their own—the interest in not debasing their own processes by ordering procedures which may stultify rather than resolve and which raise serious problems of due process. All of these considerations would seem to undermine any presumption of arbitrability and point toward refusing to compel arbitration unless the employer and union had explicitly agreed that such disputes were to be referred to the arbitration.

An immediately appealing alternative is for the courts to order tripartite arbitration, making the other union a party to the proceeding.²⁸ Such an arbitration will permit full consideration of the competing claims, provide a final award, and avoid recourse to economic force. It will fulfill all of the public purposes of arbitration and the national policies for settling these disputes—that is, all but one: the policy that arbitration be rooted in the consent of the parties. The question then is posed, how much does this violate the consent of the parties? If both collective agreements contain arbitration clauses which encompass work assignment disputes, then all parties are agreed that arbitration is the most appropriate forum for such issues. Nor is the problem significantly altered because two contracts are being interpreted simultaneously, for the issue under each contract is the boundary line between the two. The lack of consent lies in the fact that each union agreed to arbitrate with the employer but not with each other, and the employer agreed to arbitrate with each union but not with both together. In part this means that an unexpected party will be present at the hearing, presenting evidence, cross-examining witnesses and giving evidence. But the parties have small claim that arbitration awards should be made without fullest exploration of the issues, and the arbitrator has a responsibility beyond the immediate parties to make a fully considered decision. Indeed, he might call upon the other union to add any relevant evidence or viewpoint. More substantial is that an uninvited party shares in the selection of the arbitrator, and this

²⁸ For a vigorous advocacy of this procedure, see Jones, *Autobiography of A Decision: The Function of Innovation in Arbitration and The National Steel Orders of Joinder and Interpleader*, 10 U.C.L.A. L. Rev. 937 (1963). For an exploration of some of the improprieties and pitfalls of this procedure, see Bernstein, *Nudging And Shoving All Parties to A Jurisdictional Dispute Into Arbitration: The Dubious Procedure of National Steel*, 78 Harv. L. Rev. 784 (1965).

may result in the choice of a different person than if either union were arbitrating with the employer alone. Because the parties view the identity of the arbitrator as an important part of the process and the choice of the two unions might be quite different, this cannot be dismissed as a minor encroachment on their freedom of contract. It is this which strips court ordered tri-partite arbitration of its appeal. But if the alternative is to compel a two-party proceeding which can give the parties no effective award but only lead to another equally fruitless proceeding, then the tri-partite solution looks less unlovely and less at odds with the needs and expectations of the parties. Faced with this choice, I believe the court should fashion a tri-partite procedure unless one for the agreements explicitly precludes it.

Needless to say, if either or both agreements have no arbitration provision encompassing work assignment issues, then tri-partite arbitration cannot be ordered. For here there is lacking a tap root of consent to the arbitration process. And Section 10 (k) makes clear that unions shall be free to reject arbitration of their work assignment disputes.

Perhaps we should think more of the third alternative—the one the Court dismissed as unthinkable. Refuse to order arbitration and open the forum of economic contest by declaring that the no-strike clause does not reach such disputes. If we look closely at this solution its seeming coarseness may have a rugged beauty. When the IUE threatened to strike to compel assignment of the work, either the Company, the Federation, or even any employee could file a charge under Section 8 (b) (4). This would bring into play Section 10 (k). If the parties could not then agree to arbitration, the dispute would be decided by the Board applying, according to the command of the Supreme Court, “the standard generally used by arbitrators.”²⁹ That standard will be the two collective agreements and the boundary line between, drawn by the parties in response to the Board’s certification. The employer will thereby obtain a final and binding decision in an appropriate forum. There is a risk that in spite of the threat of strike or even a strike itself neither the company nor the other union or any other person will file a charge to set the statutory solution in action, but this risk may be prefer-

²⁹ *NLRB v. Radio & Television Broadcast Engineers*, 364 U.S. 573, 583 (1961).

able to the admittedly unsatisfactory alternatives. And one might find some therapeutic value in the strike, particularly where the parties have a variety of peaceful solutions readily at hand once they feel the pinch of economic loss.

The other problem posed by *Carey v. Westinghouse* is quite easy to unravel, if one is not bemused by the Courts unbounded reliance on arbitration. If the dispute is which union should represent the employees involved, arbitration is neither necessary nor appropriate. The proper forum is the NLRB and it is available by a simple motion to clarify the certification. The employer and both unions will be parties to the proceeding and the decision will be final and binding. More important, the issue is not within the competence of the arbitration for it is not a matter of contract right but of statutory right. Indeed the parties cannot by contract expand the union's right to represent employees beyond the bargaining unit defined by the Board, particularly at the expense of another union certified for an adjoining unit. In *Westinghouse* neither union by its agreement could draw the boundary line other than where the Board would draw it. And an arbitrator presented with the issue could find no useful guides in the contract, but would be compelled to look to Board principles and premises. As the Court admitted, if the Board draws a different line the arbitrator's decision is revealed as meaningless. To commit this issue to arbitration is to rip arbitration from its roots of consent as expressed in the collective agreement. The Court's justification that the Board will give deference to the arbitral award only underlines that the rights being adjudicated are statutory, and in turn raises questions as to the propriety of the Board's giving such deference to private arbitration. But this is a discrete problem to be reached later.

The Courts rhetorical device of looking at the case first as a work assignment dispute and then as a representation dispute mutes a major consideration. One of the most difficult problems, as *Carey* itself makes clear, is deciding which kind of a dispute is involved. This, in turn, poses the threshold question of who is to categorize the dispute. The Court avoided this question by finding that the same forum was appropriate for both kinds of disputes, and though it did not emphasize the weight to be given this consideration, it is undoubtedly substantial. The Court wisely directed both disputes to the same forum, but unwisely preferred the wrong forum. Only

the Board can settle the representation issue, and with a fully adequate procedure including all of the parties. Directing the work assignment dispute toward a Section 10 (k) proceedings is at least no worse than the alternatives, and the Board which has competence in both kinds of disputes can make any categorization necessary. For these reasons, when a genuine boundary dispute between two unions is involved, the best solution would be to refuse to compel arbitration unless all three parties had explicitly agreed to so submit such disputes.

IV

Though arbitration has a public function and serves certain public purposes, it is still a private process of limited potential. Though arbitration is "an instrument of national labor policy for composing contractual difference," it is not the sole or even principal instrument for promoting industrial peace. There is a danger that it will be burdened by public responsibilities beyond its competence or capacity to bear. As the Court's opinion in *Carey* reveals, that danger rests in those blindly infatuated with the arbitration process who love not wisely but too well.

The seriousness of the danger is made plain by *Carey v. Westinghouse*, for the Court ordered arbitration of the representation issue and then suggested that the Board give deference to the arbitrator's decision. But the specific issue is the interpretation and clarification of the Board's decision as to the boundaries of the bargaining units. Thus arbitration is conscripted as a substitute for the Board and asked to perform the public function for which the Board has been specially established. And the Board, charged by Congress with this responsibility, will give deference to a private arbitrator's interpretation of its own order.

The Board's doctrine of deference to arbitration may take less gross forms disguised with the words of sweet reasonableness. For example, in the *International Harvester* case,³⁰ the union demanded the discharge of an employee for failing to pay dues under the union shop agreement, and when the employer refused carried the case to arbitration. In the meantime the contract had expired and had been

³⁰ *International Harvester Co.* 138 NLRB 923 (1962).

replaced by one without a union security clause. The arbitrator ruled that since the employee should have been dismissed under the old contract but could not be discharged under the new contract, he should be treated as discharged and then retired under the new contract. This, of course, reduced his seniority and later led to his lay-off. He then filed a charge with the Board, claiming unlawful discrimination because at the time his seniority was reduced no valid union security clause was in effect. The Board extolled the virtues of arbitrators and the Courts deference to it in contract disputes. From this it concluded that "complete effectuation of federal policy" required that the Board "give hospitable acceptance to the arbitral process . . . unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the Act."³¹ Because the award was not "palpably wrong" the Board found it unnecessary to inquire into the merits. To do more "would mean substituting the Board's judgment for the arbitration"³² contrary to national labor policy.

But is it contrary to national labor policy for the Board to substitute its judgment as to what constitutes an unfair labor practice for that of an arbitrator? The charge filed by the individual is not that his loss of seniority violates the contract but that it violates the statute. For the Board to honor the award unless it is "palpably wrong" is to place on the arbitrator the responsibility not only to interpret the contract but to interpret the statute. The arbitrator may be a perceptive lawyer to whom the Board might wisely listen;³³ but he may also be an economist, a human relations expert, or a Catholic priest with no knowledge of the legal issues. And the arbitration process will be confused if not wholly distorted if the parties and the arbitrator realize that the award will substitute for the Board's judgment. The difficult position of the arbitrator and the inappropriateness of contract arbitration is especially acute in a case like *International Harvester*, for the very purpose of the union shop proviso in Section 8 (a) (3) is to prohibit the making of certain agreements. The arbitrator, appointed under the contract

³¹ 138 N.L.R.B. at 927.

³² 138 N.L.R.B. at 929.

³³ The arbitrator in the case was David L. Cole who is an experienced labor lawyer as well as one of the nation's outstanding arbitrators, and member of many governmental commissions and panels.

to interpret the contract, is deferred to in this determination as to whether the contract violates the Act. The arbitrator may well attempt to construe the contract to avoid a clash with what he believes the law requires, but his position ill-suits him to give voice to statutory policies which run against the contract.

In other cases where discharges are claimed to violate both contractual and statutory rights, the Board has said that it would postpone action until after the contractual rights have been adjudicated.³⁴ The Board may thereby avoid the necessity of making a decision, for if the arbitrator orders reinstatement and back pay, the Board procedures become superfluous not because statutory rights have been vindicated but because the substance of the violation has disappeared. But for the Board to shelve the case until after arbitration adds to the already debilitating slowness of the Board procedure. To make exhaustion of contract remedies a prerequisite to statutory procedures means that the existence of possible contract rights qualifies statutory rights—a rather novel conclusion which also assumes that one who had meaningful contract rights, enforceable in arbitration, would prefer the ponderous Board procedures.

There are cases in which the Board should defer to arbitration, for an unfair labor practice may depend on the meaning of the contract. If an employer unilaterally eliminates a Christmas bonus, without consulting the union, this constitutes a refusal to bargain unless the contract reserved this right to the employer. Whether the contract authorizes the employer to take unilateral action should be left to the arbitrator.³⁵ But the guiding principle remains the same—the responsibility for interpreting the contract belongs to the arbitrator, but the responsibility for interpreting the statute rests on the Board. The national labor policy favors arbitration as a substitute for the courts in giving meaning and content to collective agreements; but Congress has created the Board as a specially competent tribunal and designed a specially adapted procedure for giving meaning and content to the statute. For the Board to covet the court's servant and appropriate that servant to perform its work is a violation of the statutory commandment.

³⁴ See *Dubo Manufacturing Co.*, 53 L.R.R.M. 1070 (1963).

³⁵ See *Speidel Corp.*, 120 N.L.R.B 733 (1958).

CONCLUSION

These are but illustrative problem areas which reveal the tension between the private nature and the public function of labor arbitration. They make quite clear that a failure to recognize the dual character of arbitration and to accommodate the dual needs can discredit or abuse the process. To view arbitration solely as the product of a private agreement between the union and the employer misleads some to conclude that an individual employee had no right to participate in the procedure. But to deny an individual whose very fate is at stake the right to be heard can only discredit arbitration as an instrument of justice. To overemphasize the public function of arbitration misleads both the Board and the Court to confer upon arbitrators whose authority and guides are defined by the collective agreement the power to interpret and apply statutes. This imposes on a private process, created for limited purposes, a public responsibility beyond its capacity to bear.

There is no simple solution, for the public and private functions of arbitration inevitably qualify each other. But we can make the necessary accommodation if we keep clearly in mind the roots of each function. The private nature of arbitration is rooted in private agreement—agreement to use arbitration, agreement as to the guides to govern the arbitration, agreement as to the choice of the arbitrator. The public function of arbitration is rooted in its use as a substitute for public tribunals on the one hand and economic battle on the other. If we expect neither too little nor too much of arbitration, we can find solutions which will enable it to fulfill adequately both functions.

SUMARIO

En este trabajo el autor considera la tensión entre la naturaleza privada y la función pública del arbitraje laboral.

Como ejemplos para su exposición, el autor toma casos recientemente decididos por el Tribunal Supremo de los Estados

Unidos de América. Concluye que es peligroso considerar el arbitraje como el resultado exclusivo de un acuerdo privado entre una unión y el patrono, al igual que es peligroso enfatizar demasiado la función pública. Debe el arbitraje satisfacer adecuadamente ambas funciones.